

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2086

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2086

PHILIP McCRORY,

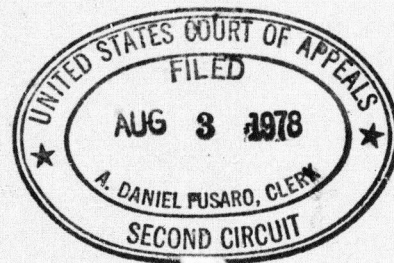
Petitioner-Appellant,

- v -

J. E. LA VALLEE, SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY,

Respondent-Appellee.

APPENDIX FOR PETITIONER-APPELLANT
PHILIP McCRORY



DAVID BLACKSTONE
401 BROADWAY
NEW YORK, N. Y. 10013
TEL. NO. 226-6684

ATTORNEY FOR PETITIONER-APPELLANT
PHILIP McCRORY

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EXHIBIT A

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PLAINTIFF

McCRORY, PHILIP, U.S.A. ex rel.

DEFENDANTS

LAVALLEE, J.E., Supt. Clinton
Correctional Facility

CAUSE

F.L.

WRIT OF HABEAS CORPUS
28 USC 2254

ATTORNEYS

Pro Se:
Philip McCrory #73 A 570
Box B
Dannemora, N.Y. 12929

For Defendant:
Louis J. Lefkowitz
Attorney General- State of NY.
Two World Trade Center
N.Y., N.Y. 10047

77-2086

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UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

75-6104 U.S.A. ex rel., Philip McCrory -V- J.E. Lavalley, Supt. Clinton

DATE	NR.	PROCEEDINGS
12-05-75	1	Filed petition for writ of habeas corpus.
12-05-75	2	Filed order granting petitioner to proceed in forma pauperis, Ward.
12-29-75	3	Filed affdvt. and order extending respondent's time to file opposi- to petition to 1/25/76.-- Knapp, J.
01-05-76	4	Filed respondent's (Walton Sutherland) affdvt. in opposition to petitioner's application for writ of habeas corpus.
01-05-76	5	Filed petitioner's amendment to petition.
01-19-76	6	Filed notice of assignment to Carter, J.
01-30-76	7	Filed petitioner's affdvt of Reply to the respondents affdvt in opposition to his application for a federal writ of habeas corpus.
11-1-76	8	Filed Order that The Cr. Clerk, Supreme Ct., Bx Cty, NY is Ordered to sent the transcript of the trial of case People Vs P. McCrory, decided 9-24-73 in Spreme Ct Bx Yx Cty., NY., to the chambers of Judge Carter USDC Judge Rm 2903 as soon as Possible....Carter,J. mn/copy
2-2-77	9	Filed NYS's Memo of Law on the constitutionality of Former Sec 250.20 of NYC Cr Procedure Law.
2-17-77	10	Filed Pltff's affdvt of Reply in further support of its motion for writ h/c.
3-18-77	11	Filed Respondent's affdvt in response to pltff's affdvt of Reply.
3-23-77	12	Filed Petitioner's Affdvt of Reply in further support of his motion for writ of H/C.
4-14-77	13	Filed Respondent's affdvt Res: to Petitioner's 3 discovery motions.
4-22-77	14	Filed Petitioner's affdvt of Reply in further support of his petitionn for writ of H/C.
6-22-77	15	Filed Opinion # 46052.--Accordingly , the petition for Habeas Corpus relief is denied in all respects. It is so ordered...Carter,j. M/N
7-15-77	16	Filed respondent's Affdvt. in opposition to petitioner's request for a certifica- of probable cause for an appeal to the USCA etc.
7-26-77	17	Filed Petitioner's affdvt of Reply in furhter support to his application for a Certificate of Probable Cause for an appeal to USCA from order dtd 6-22-77
8-1-77	18	Filed Petitioner's Notice of Appeal to USCA from order fld 6-22-77.
7-27-77	19	Filed Fld Certificate of Proble Caase....Granted. Carter,J.

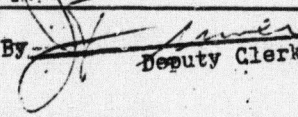
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RAYMOND F. BURGHARDT, ClerkBy  Deputy Clerk

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES ex rel. PHILIP McCrORY, :

Petitioner, :

- against - :

J.E. LaVALLEE, Superintendent of
Clinton Correctional Facility, Dannemora
New York 12929, :

Respondent. :

75 Civ. 6104 (RLC)

746052

----- x
APPEARANCES:

PHILIP McCRORY
Box B - 73 A 520
Dannemora, New York 12929
Petitioner, Pro se

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Two World Trade Center
New York, New York 10047
by: ALAN SMULEVITZ
Assistant Attorney General
Attorney for Respondent

MICROFILM

JUN 22 1977

CARTER, District J.

12

OPINION

Philip McCrory ("petitioner"), currently confined in the Clinton Correctional Facility at Dannemora, New York, seeks a writ of habeas corpus. Petitioner was convicted of various crimes after trial before a jury in New York Supreme Court, Bronx County, and was sentenced in the aggregate to a minimum term of ten years and a maximum term of thirty years. The conviction was modified and affirmed by the New York Supreme Court, Appellate Division, People v. McCrory, 47 App. Div. 2d 887, 367 N.Y.S. 2d 22 (1st Dept. 1975), and leave to appeal to the New York Court of Appeals was denied. Petitioner made a post trial motion to vacate his conviction, based on the asserted unconstitutionality of the New York notice of alibi statute. The motion was denied by New York Supreme Court Justice Lawrence H. Bernstein on January 24, 1974. Petitioner has thus apparently exhausted his state remedies, and this court has jurisdiction. 28 U.S.C. § 2254.¹

Facts

Petitioner was indicted by a Bronx grand jury for allegedly committing the crimes of rape, sexual abuse, sodomy, robbery, burglary in the first degree, and possession of a dangerous weapon. These charges arose out of petitioner's alleged attack against two women, Florine Crews and Sally McIntyre, on June 28, 1971. After the alleged attack and before trial, both complainants picked out petitioner's photograph from a group of photographs shown to them by the police, and both indicated that it was a photograph of their assailant. On January 31,

1972, the police arrested petitioner at his apartment. Petitioner was given Miranda warnings by the arresting officer and then brought down to the 42nd precinct in the Bronx, where the police questioned him regarding the crimes alleged to have been committed against McIntyre and Crews. Petitioner initially denied having anything to do with these crimes, but after speaking with his girlfriend told the police, in essence, that he probably committed the crimes, but could not remember because he does not remember when he drinks (H.T.,² pp. 23-24). Petitioner never directly admitted having committed the crimes, however. Later, on February 10, 1972, both complainants picked petitioner out of a lineup conducted by the police.

Prior to trial, hearings were held to determine the admissability of the identifications of petitioner made by complainants, and of the statements allegedly made by petitioner to police. It was determined at these hearings that petitioner's rights had been fully protected by the procedures followed by the police, and that both the identifications and the statements were admissible at trial.

At trial both complainants testified, and both identified petitioner as the person who had attacked them. Petitioner did not testify in his own behalf, but produced two witnesses who testified that plaintiff could not have committed the crimes charged because the night of the alleged crimes he had attended the movie "Love Story" in Manhattan, and had stayed the entire night at a friend's house in Queens. The state thereupon called several witnesses to rebut petitioner's alibi. Two of these witnesses, Harris and Jackson, testified that they had been with petitioner in the Bronx on the night in question. The two other rebuttal witnesses, Spano and Fodor, employees of the Apollo Theatre on 42nd Street, testified that on the night petitioner says he saw "Love Story" in a Times Square

theatre featuring it singly, "Love Story" was playing as part of a double feature at the Apollo and that as far as they knew no other Times Square theatre was playing "Love Story" that night. The jury convicted petitioner on all counts.

Petitioner's Contentions

Petitioner attacks his conviction on numerous grounds. First, that petitioner's rights were violated by the state's failure to serve a pre-trial notice of their rebuttal witnesses. Petition, p. 26. Second, that petitioner's Fourteenth Amendment rights were violated when "false evidence" which had a material effect on the jury was introduced by the state. Petition, p. 40. Third, that the trial court erred in denying the defendant's motion for a mistrial, since the prosecution offered the testimony of two complainants who were the subject of counts in the indictment which were ordered severed prior to the trial at which defendant was convicted. Petition, p. 20. Fourth, that there was insufficient corroboration of the sex offenses since the testimony of the two complainants served as the only corroboration to the alleged crimes, and the law does not permit "two uncorroborated rape complainants to corroborate themselves." Petition, p. 18. Fifth, that the lineup identification testified to on the state's case in chief unconstitutionally tainted the in-court identification. Petition, p. 30. Last, that the alleged incriminating admissions made by petitioner and introduced at trial were never made at all, and therefore the contrary finding of the presiding judge at the pre-trial hearing was erroneous and violated petitioner's constitutional rights. Petition, p. 46.

Notice of Alibi Statute³

Petitioner alleges that his due process rights were violated when he was required pursuant to New York Criminal Procedure Law § 250.20 to serve

the state with a pre-trial notice of his alibi witnesses without receiving reciprocal notice of the state's witnesses. It is quite clear that the New York notice of alibi statute under which the state made its pre-trial demand is unconstitutional. People v. Bush, 33 N.Y.2d 921, 352 N.Y.S. 2d 936 (1973); Wardius v. Oregon, 412 U.S. 470 (1973). Nevertheless, petitioner's claim must be rejected.

Had petitioner not been allowed to present his alibi defense because of non-compliance with the statute, there could be little doubt that any conviction reached by the jury would be void. Wardius, supra. Yet here petitioner was in no way precluded at trial from setting forth his alibi. Thus, unlike the situation in Wardius, the only possible prejudice petitioner can point to by operation of the alibi notice statute in this case is the lack, if any, of adequate time to prepare cross-examination of the state's rebuttal witnesses. If the petitioner can show no such prejudice, he can claim no due process deprivation. See Green v. Fogg, 422 F. Supp. 1034 (S.D.N.Y. 1976).

Petitioner has not made the requisite showing here, and an examination of the record of petitioner's trial indicates that he could not possibly do so. The rebuttal testimony of all four state witnesses was relatively straightforward and little preparation was necessary for proper cross-examination. Petitioner could have, if he had felt any need, requested an adjournment at the time the state put forth its rebuttal witnesses. He did not do so, and from this failure the court may confidently conclude that he deemed no additional preparation necessary.⁵

Indeed, as far as witnesses Harris and Jackson are concerned, it is evident that cross-examination of them was limited because of the fear that any deeper probing might lead the jury to suspect that petitioner had also been accused of wrongdoing against these witnesses.⁶

It is not quite so clear why the cross-examination of witnesses Spano and Fodor — employees of the Apollo Theatre — was as limited as it was. However, petitioner at no point indicated any surprise that they were called; nor did he ever indicate in any way that he was unprepared for cross-examination. Although a state may not subject a defendant to "the hazard of surprise concerning the very pieces of evidence which he disclosed to the state," Wardius, supra, 412 U.S. at 476, due process does not require that a defendant be made aware of the state's rebuttal evidence prior to the introduction of his alibi. See Green v. Fogg, supra. Indeed, such a rule would in many instances simply allow a defendant to doctor his alibi to fit the state's rebuttal case. Considering this, and given the failure of petitioner to indicate any prejudice until after the trial was completed, any surprise the testimony of Spano and Fodor may have caused petitioner does not rise to the level of such unfairness as to render his conviction void.

The Use of "False" Evidence

On the basis of an affidavit and several letters, petitioner attempts to show that the state intentionally introduced false evidence that the movie "Love Story" played in only one theatre in the Times Square area on June 28, 1971.⁷ Petitioner argues that the use of this false evidence had a material effect on the jury, and therefore his conviction should be voided. However, all petitioner has shown is that the state's witnesses testified incorrectly. He has presented the court with no evidence whatsoever that the incorrect testimony was given deliberately with the contrivance of the state, or that the state knew the testimony was false yet allowed it to go uncorrected. Could petitioner produce such evidence he would have a strong claim, Miller v. Pate, 386 U.S. 1 (1967), assuming that

he could also show that the testimony involved had materially affected his conviction.

In the absence of such evidence, petitioner's claim can succeed only if he can show that the evidence he has newly discovered is of sufficient importance to require a new trial. In this Circuit, as in others, a new trial will be granted on the basis of new evidence discovered after trial only where the evidence could not have been discovered earlier by the exercise of due diligence, and where the evidence is so material that it would likely have produced a different verdict had it been available at trial. See United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975); United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975); United States v. Parness, 408 F. Supp. 440 (S.D.N.Y. 1975).

Petitioner's claim meets neither of these prerequisites for relief.

There appears to be no reason why petitioner could not with due diligence have discovered earlier the evidence he now puts forth. Furthermore, the evidence of petitioner's guilt presented at trial was so overwhelming that even had this new evidence been part of the trial record, it is extremely unlikely that the outcome would have been any different. This contention is therefore rejected.

The Testimony of Witnesses Harris and Jackson

The indictment charging petitioner included witnesses Harris and Jackson as complainants. By order of Justice H. Schwartz, however, trial of the charges concerning complainants McIntyre and Crews was severed from trial of the charges concerning complainants Harris and Jackson. In this trial, Harris and Jackson testified in the state's rebuttal case that petitioner was with them at the time that petitioner's witnesses claimed he was in Queens. At no point was it stated or even hinted that Harris and Jackson were victims of any illegal activity on the part of petitioner, or that anything unusual had occurred when the witnesses

were with McCrory. Any claim, therefore, that the testimony of these witnesses conflicted with the severance order is totally without substance. Furthermore, this court finds, as did the trial court, that the testimony of Harris and Jackson was not prejudicial to petitioner. T., p. 419.

Corroboration in Sex Offenses

In his charge to the jury concerning the sex offense counts, the trial judge stated:

"There must be some independent evidence substantiating the female's testimony which may consist of testimony of material facts by witnesses other than the female witness or exhibits admitted into evidence. Here the alleged corroboration with respect to Sally McIntyre is the testimony of Florine Crews and with respect to Florine Crews the corroboration, alleged corroboration, is the testimony of Sally McIntyre." T., p. 509.

Petitioner contends that this instruction was constitutionally deficient. He states:

"It is respectfully submitted that rules of law, such as the corroboration requirements, which are primarily designed to protect a defendant should not be so abused so as to permit a bootstrap operation by which two otherwise uncorroborated rape complainants may corroborate themselves and thus create, in effect, an evidentiary 'positive' from two evidentiary 'negatives'." Petition, p. 18.

Petitioner does not, however, state a valid claim for habeas corpus relief. A federal court in a habeas corpus proceeding may reach down and upset a state conviction only where it is demonstrated that there has been a fundamental unfairness at trial or an infringement of specific constitutional rights. Schraeder v. Riddle, 405 F. Supp. 752 (W.D. Va. 1975); United States ex rel. Rush v. Ziegele, 335 F. Supp. 434 (D.N.J. 1971), aff'd, 474 F. 2d 1356 (3d Cir. 1973). No such demonstration has been made here. The rule of corroboration in sex offense cases is based on public policy considerations — i.e., the distrust of uncorroborated testimony

of a professed sex crime victim, see, e.g., People v. Friedman, 139 App. Div. 795, 124 N.Y.S. 521 (2d Dept. 1910) — and is purely a matter of state law. The rule has no genesis in constitutional law, and its violation raises no issues of fundamental unfairness in trial.⁹ Therefore, even if the state court's interpretation of the New York corroboration statute was incorrect, which issue is not reached, it is not the province of this court to overturn the petitioner's conviction on that ground. As this Circuit has held:

"[if the rule were otherwise] every disagreement by a federal district judge with a State court's interpretation of a State statute and their appraisal of a State trial court's instruction thereunder potentially [would raise] a question of 'fundamental due process.' This result would impose an additional burden on our already overburdened federal courts and pose an unnecessary and undesirable threat of greatly increased federal intervention in cases involving the sufficiency of jury instruction and the construction of State law."

Schaefer v. Leone, 443 F.2d 182, 185 (2d Cir. 1975). See also, United States ex rel. Epton v. Nenna, 446 F.2d 363 (2d Cir. 1971); United States ex rel. Collins v. Patterson, 406 F. Supp. 975 (S.D.N.Y. 1975); Jackson v. Smith, 406 F. Supp. 1370 (W.D.N.Y. 1976).

Lineup Identification and Statements to Police

Pursuant to petitioner's demand the trial court conducted both "Wade" and "Huntley" hearings, and thereafter decided that both the prior identifications of petitioner and the statements of petitioner allegedly made to the police were admissible at trial. Petitioner attacks this determination on the ground that it was clearly erroneous. However, with certain exceptions not applicable here, the factual determinations of a state court are presumed correct in a federal habeas corpus proceeding. 28 U.S.C. § 2254(d); LaVallee v. Delle Rose, 410 U.S.

690 (1973); United States ex rel. Sabella v. LaFollette, 432 F.2d 572, 574 (2d Cir.), cert. denied, 401 U.S. 920 (1974). Only a showing by convincing evidence that the state court was in error overcomes this presumption. United States ex rel. Stanbridge v. Zelker, 514 F.2d 45, 51 (2d Cir. 1975). No such showing has been made here.

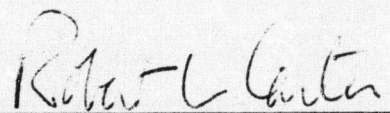
Indeed, an independent application of the relevant federal law to the facts adduced at trial fully supports the state court's finding that both the petitioner's statements to the police and the evidence of pre-trial identifications of petitioner were admissible at trial. This contention, therefore, lacks merit.

Accordingly, the petition for habeas corpus relief is denied in all respects.

IT IS SO ORDERED.

Dated: New York, New York

June 22, 1977



ROBERT L. CARTER
U. S. D. J.

75 Civ. 6104

FOOTNOTES

1. The state does not contest petitioner's assertion that he has exhausted his state remedies, even though it is not entirely clear with regard to some of the petitioner's claims that strictly applying Picard v. Connor, 404 U.S. 270 (1971), this is true. Mindful of the need to construe pro se habeas petitions with some tolerance, however, see Haines v. Kerner, 404 U.S. 519 (1972) (per curiam), and given the failure of the state to contest the issue of exhaustion, petitioner shall be given the benefit of the doubt and I shall assume that petitioner has fully exhausted his state remedies.
2. Hearing transcript. The symbol T., used later, shall refer to the trial transcript.
3. As indicated at the outset of this opinion, petitioner's post-trial motion based on this point was rejected by the New York Supreme Court, Bronx County.
4. McCrory's trial began one month after Wardius, supra, and ended a few months before Bush, supra.
5. Petitioner's claim to the contrary is undoubtedly traceable to his belief that he has recently uncovered new evidence that he believes could have been used to impeach the testimony of witnesses Spano and Fodor. (See the discussion in this opinion regarding the claim that false evidence was introduced at trial by the state.) Two facts should be recognized as far as this is concerned. First, it took petitioner over two years after his trial to discover this evidence, and there is no reason to believe that earlier notice of the state's rebuttal witnesses would have shortened the time span. Second, it severely strains credibility to believe that when the state offered rebuttal evidence that the Apollo Theatre, on 42nd Street, was the only theatre in the Times Square Area playing "Love Story" on the night in question, plaintiff, if he had in fact seen the movie at a theatre more than six blocks away, would not have challenged this testimony in some way, or at least requested some time to check on the testimony. The record shows, however, that petitioner's examination of Spano and Fodor was extremely brief, and did not raise this issue at all.

Moreover, while on summation petitioner's attorney questioned to some extent the accuracy of witnesses Spano's and Fodor's testimony, T. p. 440, he at no point even remotely suggested that petitioner might have gone as far from the subway as 48th Street. In fact, his summation clearly indicates that it was never even considered, nor was the jury asked to consider, that petitioner might have gone to a theatre outside of the 40th - 42nd Street area of Times Square, as petitioner now apparently contends. T., p. 439-40.

6. Furthermore, petitioner could not have been surprised as to the testimony of these witnesses. Harris and Jackson had identified petitioner at a police lineup, as petitioner knew, and were complainants in the case that petitioner had successfully moved to sever from this one.
7. Petitioner has attached to his petition an "affidavit" of Jack Jemal, part owner of the Agee II movie theatre located on Seventh Avenue and 48th Street in New York City, which states that "Love Story" played at that theatre on June 28, 1971 as a single feature. Petitioner has also attached to his petition several letters which purport to be correspondence concerning whether "Love Story" played at the Agee II theatre on that date. The affidavit and letters, however, were merely copies, and petitioner was requested to supply the court with the originals. Although there is some question whether the materials sent by petitioner in response to the court's request are actually originals — some of them again appear to be photocopies — for the purposes of this opinion it shall be assumed that they are both authentic and accurate.
8. Indeed, in 1974 the New York legislature abolished the requirement of corroboration in most sex offense cases, New York Penal Law §§ 130.15 and 130.16 (McKinney 1975). In approving the change, the Governor of New York stated that:

"The implicit suggestion in the corroboration rule that the testimony of women, who are most often complainants in sex cases, is inherently suspect and should not be trusted without the support of the independent evidence, is without justification and contrary to our strong belief in the principle of complete equality for women in our society."

Quoted in the Practice Commentary to N.Y. Penal Law § 130.16.

EXHIBIT C

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

JACK JEMAL, being duly sworn, deposes and says:

I reside at 610 Avenue J. Brooklyn, New York, and maintain my office at 666 Fifth Avenue, New York, New York.

On June 27, 1971, I was part owner of a movie theatre known as AGEE 11, located at 711 Seventh Avenue, New York, New York. My records indicate that on June 27, 1971, the sole feature film at the AGEE 11 was "Love Story". This was a single feature without a co-feature and was shown at the theatre from June 23, 1971 to and including September 14, 1971.

/s/ Jack Jemal
JACK JEMAL

Sworn to before me this

13 day of August, 1973.

/s/ Walter Friedrichs

Walter Friedrichs
Notary Public, State of New York
No. 68-6417735
Qualified in Westchester County
Term Expires March 30, 1974

(Exhibit "C")

March 21, 1975

Paramount Pictures Corporation
One Gulf @ Western Plaza
New York, N.Y. 10023

Att. Paul Springer, Esq.

Dear Mr. Springer:

Further to your conversation with my secretary, Audrey Fraca, of today's date, I wish verification from Paramount Pictures of the following:

That the motion picture LOVE STORY played at the Agee II (now called the Cine II), located at 48th Street and Seventh Avenues, on June 27, 1971.

For your information, I am enclosing copy of correspondence received by me from Philip McCrory requesting such information.

Very truly yours,

JJ:af
Enc.

Jack Jemal

Exhibit "D"

PARAMOUNT PICTURES CORPORATION

PAUL D. SPRINGER
Attorney

April 16, 1975

Mr. Jack Jemal
666 Fifth Avenue
Suite 1010
New York, New York 10019

Dear Mr. Jemal:

This will acknowledge receipt of your letter dated March 12, 1975.

An examination of our records indicates that the motion picture
Love Story was exhibited at the Agee 11 Theatre on June 27, 1971.

Very truly yours,

/s/ Paul Springer
Paul D. Springer

PDS/gk

Telephone
(212) 265-5570

" Exb.E "

OFFICE OF THE UNDERSIGNED

666 Fifth Avenue Suite 1010

New York, N.Y. 10019

April 17, 1975

Mr. Philip McCrory
Box B 73-A-520
Dannemora, New York 12929

Dear Mr McCrory:

As per your request in your letter of March 17, 1975, enclosed please find letter from Paul D. Springer, Esq., attorney for Paramount Pictures Corporation, confirming that the motion picture Love Story was exhibited at the Agee 11 Theatre on June 27, 1971.

I hope that the attached letter will be of some use to you. Best of luck.

Very truly yours,

/s/ Jack Jemal
Jack Jemal
610 Avenue J
Brooklyn, New York 11223

JJ:af
Enc.